DISSENTING OPINION OF JUDGE PETRÉN

[Translation]

Having voted against the adoption of the Order, I append a dissenting opinion.

Considering the identity of claims and submissions between this case and the *Nuclear Tests* case *(Australia* v. *France)*, as well as the coincident circumstances of fact and law, I was of the opinion that the two cases should have been joined even at the present stage of the proceedings. The Court having rejected that proposal, it only remains for me to express the same opinion here as in the other case.

I am unable to concur in the opinion of the majority either with regard to the deferment, to a later stage in the proceedings, of the questions of the Court's jurisdiction and the admissibility of the Application, or with regard to the indication of provisional measures.

In my view, the questions of the Court's jurisdiction and of the admissibility of the Application, and also the question of the indication of provisional measures, fall into a common framework as follows:

Before undertaking the examination of the merits of the case, the International Court of Justice, like any other court, has the duty of making sure as far as possible that it possesses jurisdiction and that the application is admissible. The absence of the State against which application is made does not alter this requirement in any way. On the contrary, Article 53 of the Statute lays an obligation on the Court to satisfy itself as to its possession of jurisdiction and the admissibility of the application on the basis of the elements at its disposal. Among the latter in the present case are the arguments put forward by France in the letter handed in by its Ambassador, and by New Zealand in its Application and in its oral pleadings of 24-25 May 1973. It is, however, the Court's duty also to consider any other elements that it may find relevant. The fact that New Zealand has requested provisional measures does not dispense the Court from the obligation of beginning by an examination of the questions of its jurisdiction and of the admissibility of the Application; indeed, it makes that examination, if anything, more urgent.

For it to be possible for the Court to consider that it has jurisdiction on the merits of the case, it would, as I see it, be necessary for it to approve at least one of three propositions which would serve to underpin the Application of the New Zealand Government:

1. The reservation expressed by France when in 1966 it renewed its acceptance of the Court's jurisdiction, a reservation referring to activities

connected with French national defence, is not valid;

2. The nuclear tests referred to in the New Zealand Application are not connected with French national defence;
3. The General Act of 1928 has remained in force as between States parties to that Act in 1944, the consequence of which is that reservations made by such States in accepting after 1945 the jurisdiction of the International Court of Justice are without effect in their relations among themselves.

The questions thus raised for the Court do not concern the merits of the case. They occur in a general framework of international law and, in my view, the Court would not have needed any further explanations from the New Zealand Government in order to resolve them, and it could and should have settled them on the basis of the elements at its disposal.

In this connection, it should be pointed out that the question of jurisdiction raises the issue of the extent to which the 1928 General Act can have survived the disappearance of the League of Nations and its organs, as also of the effect, if any, of such survival on the reservations made by States parties to that Act when accepting the jurisdiction of the present Court. Now Article 63 of the Statute required that these States should be notified without delay that such questions were submitted to the Court in the present case. If they had been so notified, they would already have had the opportunity of manifesting their astonishment, their satisfaction or their indifference in regard to the contention of the New Zealand Government mentioned under 3 above. But the fact that the required notification has not yet been made does not justify the Court in today inviting the New Zealand Government to present, at a later stage in the proceedings, further argument on the question of jurisdiction.

I am therefore of the opinion that the Court should not have opened a new phase of the case for that purpose but, on the contrary, should have requested the New Zealand Government to complete its argument on that issue in the present stage of the case.

As the Court has now deferred its decision on the question of jurisdiction, I am unable to indicate here and now my own assessment of the various factors entering into the consideration of that question.

Nevertheless, the New Zealand Government's request for the indication of provisional measures obliges me to examine whether the pre-conditions for the Court's ability to indicate such measures have been fulfilled.

Among those pre-conditions, certain relate to the question of jurisdiction. In that connection the New Zealand Government has referred *inter alia* to the Orders made by the Court on 17 August 1972 in the two *Fisheries Jurisdiction* cases. In both of these Orders the Court considered that on a request for provisional measures it need not, before indicating them, finally satisfy itself that it had jurisdiction on the merits of the case, but that it ought not to act under Article 41 of the Statute if the absence of jurisdiction was manifest.

The New Zealand Government sought to draw from this considerandum the conclusion that it is only when the absence of the Court's jurisdiction is manifest that it ought not to act under Article 41 of the Statute. It is not possible to accept such an interpretation. The paragraph in question simply alludes to two extreme situations: one in which the jurisdiction of the Court is finally established and another in which the absence of jurisdiction is manifest. It says that the existence of the first situation is not a necessary pre-condition for the indication of provisional measures and that, in the second situation, the Court should not indicate such measures, which is a self-evident observation that does not lend itself to broader conclusions. The paragraph does not say in accordance with what criteria, within the area lying between finally established jurisdiction and manifest absence of jurisdiction, the line must be drawn between the situations which permit the application of Article 41 and those which do not permit it. It is only in a later paragraph, which the two Orders also have in common, that a reply is found to that question. There the Court indicates that it considers that a provision in a certain instrument emanating from the Parties appears, prima facie, to afford a possible basis on which the jurisdiction of the Court might be founded.

In the present case, it appears from paragraph 14 of the Order that the Court has been guided by that precedent, for it there expresses the opinion that it ought not to indicate interim measures unless the provisions invoked by the Applicant appear, prima facie, to afford a basis on which the jurisdiction of the Court might be founded. I can agree to this formula, which in my view signifies that for Article 41 of the Statute to be applicable it is not sufficient for a mere adumbration of proof, considered in isolation, to indicate the possibility of the Court's possessing jurisdiction: that there must also be a probability transpiring from an examination of the whole of the elements at the Court's disposal.

I have therefore been impelled to carry out such an examination. In the event, however, I do not find it probable that the three propositions mentioned above, or any one of them, may afford a basis on which to found the jurisdiction of the Court. For the reason already mentioned, I find myself, at the present stage of the proceedings, prevented from setting forth the considerations which have led me to that conclusion and preclude me from voting for the indication of provisional measures.

Alongside the question of the Court's jurisdiction, there arises that of the admissibility of New Zealand's Application. As I understand that term, it includes the examination of every question that arises in connection with the ascertainment of whether the Court has been validly seised of the case. But what is first and foremost necessary from that point of view is to ask oneself whether atmospheric tests of nuclear weapons are, generally speaking, already governed by norms of international law, or whether they do not still belong to a highly political domain where the norms concerning their international legality or illegality are still at the gestation stage.

Certainly, the existence of nuclear weapons and the tests serving to perfect and multiply them, are among the foremost subjects of dread for mankind today. To exorcise their spectre, is, however, primarily a matter for statesmen. One must hope that they will one day succeed in establishing a state of affairs, both political and legal, which will shield the whole of mankind from the anxiety created by nuclear arms. Meanwhile there is the question whether the moment has already come when an international tribunal is the appropriate recipient of an application like that directed in the present case against but one of the present nuclear Powers.

The Order defers the question of the admissibility of the Application, like that of the Court's jurisdiction, to a later stage in the proceedings. I am unable to concur in this decision, because I consider that the Court could and should have settled in its present session the whole of the preliminary and urgent questions which arise in the case and concerning which it is incumbent upon the Court to take up a position *proprio motu*.

To avoid anticipating such vote as I may cast in the new phase of the proceedings, I must, I feel, refrain from saying anything more on the question of the admissibility of the Application. I do not, moreover, find it necessary to answer the question whether it appears probable that the Application is admissible, which constitutes one of the conditions enabling the Court to cross the threshold of Article 41 of its Statute and indicate provisional measures. Having already found Article 41 inapplicable in this instance owing to the improbability that France, despite the reservation it has attached to its acceptance of the Court's jurisdiction, could be held subject thereto in the present case, I have no need to pronounce upon any other aspects of the question of the applicability of Article 41.

(Signed) S. PETRÉN.